

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

JEANNIE RAMIREZ,  
Appellant,

and

STATE OF IOWA (RACING & GAMING  
COMMISSION),  
Appellee.

CASE NO. 92-MA-04

PROPOSED DECISION AND ORDER

Statement of Case

Diane Tvrdik, Administrative Law Judge. On August 22, 1991, Ms. Jeannie Ramirez (Ramirez) filed with the Public Employment Relations Board (PERB or Board) a State Employee Grievance Appeal, pursuant to §19A.14(1).<sup>1</sup> Ramirez alleged that the State of Iowa, Racing and Gaming Commission (RGC or State) had violated §19A.3(20)<sup>2</sup> when it removed her position from its former "confidential" status. At hearing, the petition was amended to reflect, instead, a violation of §19A.3(16).<sup>3</sup>

On September 6, 1991, the State filed a combined Answer and Motion to Dismiss alleging (among other things) that: (1) The appeal was filed untimely, (2) the §19A.14(1) Grievance Appeal

---

<sup>1</sup>This and all subsequent statutory citations are to the Iowa Code (1991).

<sup>2</sup>§19A.3

The merit system shall apply to all employees of the state and to all positions in state government now existing or hereinafter established except the following:

20. The superintendent of savings and loan associations and all employees of the savings and loan division of the department of commerce.

<sup>3</sup>Id. at 16. All confidential employees.

process is not the appropriate forum for requesting a change in the employee's collective bargaining status,<sup>4</sup> and (3) red-circling is discretionary, (referring to an issue which had been grieved by Ramirez but had not been appealed to PERB).<sup>5</sup> At hearing, and in its post-hearing brief, the State further alleged that (4) Ramirez' grievance had not been filed with IDOP in a timely manner and (5) Ramirez' grievance failed to state a claim upon which relief may be granted.<sup>6</sup> Ramirez resisted the State's Motions to Dismiss.

On January 13, 1992, a hearing was conducted on the State's Motion to Dismiss and in the alternative, to limit the issues to be heard at any subsequent evidentiary hearing. The hearing was conducted via telephone conference. The Motion to Dismiss was denied and the Motion to limit the issues to exclude any issue of red-circle pay was granted. Each party expressed a desire to preserve its right to appeal the ruling which was adverse to its position.

An evidentiary hearing was conducted before me at PERB's office in Des Moines on January 31, 1992. Ramirez was represented by Herbert Rogers, Sr. and the State was represented by Jenifer

---

<sup>4</sup>Although not clearly articulated by the State, I consider this to be an allegation that PERB lacks subject matter jurisdiction and have addressed it as such in the legal conclusions.

<sup>5</sup>On August 8, 1992, Ramirez wrote a letter to PERB which requested that the grievance issue concerning "red-lining" of her position be withdrawn. The letter was then attached to her Appeal to PERB which was filed on August 22, 1991.

<sup>6</sup>The State made several other allegations which I have considered but will not specifically address due to my disposition of the case.

Weeks-Karns. I took official notice of the documents maintained by PERB in its official case file, and afforded the parties an opportunity to review all such documents.<sup>7</sup> Both parties had full opportunity to present testimony and evidence at hearing and both parties filed post-hearing briefs by March 31, 1992. Based on the entire record in this case, I make the following Findings of Fact and Conclusions of Law.

#### Findings of Fact

The instant dispute arises from IDOP's interpretation of the term "confidential employee" as set out in Chapters 19A and 20 and further defined in the Iowa Administrative Code, and the effect of that interpretation upon Ramirez. The relevant portions are:

Iowa Code §19A.3

The merit system shall apply to all employees of the state and to all positions in state government now existing or hereinafter established except the following:

16. All confidential employees.

\* \* \*

Iowa Admin. Code 581-r. 1.1 (19A) Definitions:

"Confidential employee" means for purposes of merit system coverage the personal secretary of: an elected official of the executive branch or a person appointed to fill a vacancy in an elective office, the chair of a full-time board or commission, or the director of a state agency; . . . (emphasis added)

"Confidential employee" means for the purposes of collective bargaining any employee who works for the department, who has access to information subject to use in collective bargaining negotiations, or who works in a close continuing relationship with representatives associated with negotiating collective bargaining

---

<sup>7</sup>§17A.14(4) Official notice may be taken of all facts . . . within the specialized knowledge of the agency. Parties shall be notified at the earliest practicable time, either before or during the hearing, . . . of the facts proposed be noticed and their source, including any staff memorandum or data . . . .

agreements on behalf of the state, as well as the personal secretary of: an elected official of the executive branch or a person appointed to fill a vacancy in an elective office, the chair of a full-time board or commission, or the director, deputy director, or division administrator of a state agency.

\* \* \*

Iowa Code §20.4 The following public employees shall be excluded from provisions of this chapter: . . .

3. Confidential employees. . . .

Iowa Code §20.3 Definitions: When used in this chapter, unless the context otherwise requires:

7. "*Confidential employee*" means any public employee who works in the personnel offices of a public employer or who has access to information subject to use by the public employer in negotiating or who works in a close continuing working relationship with public officers or representatives associated with negotiating on behalf of the public employer.

"*Confidential employee*" also includes the personal secretary of any of the following: Any elected official or person appointed to fill a vacancy in an elective office, member of any board or commission, the administrative officer, director, or chief executive officer of a public employer or major division thereof, or the deputy or first assistant of any of the foregoing.

In order to adequately establish the role which Ramirez plays at RGC it is helpful to know a small amount of the history of that office. The RGC was created as a stand-alone agency<sup>8</sup> but that status was repealed, and in 1986, RGC was included in the Commerce Department. RGC's director was Mr. Ketterer and the Administrative Assistant I (AA I) reported directly to Ketterer. That AA I position was given "confidential" status pursuant to the definition established for merit employees, in the Iowa Admin. Code and set

---

<sup>8</sup>State's Ex. B.

out above. In 1987, the RGC was moved from Department of Commerce into the Department of Inspections and Appeals (hereinafter DIA).<sup>9</sup> In 1988, Mick Lura was promoted as the RGC Division Administrator and throughout 1988 and 1989 the AA I position retained confidential status since the AA I functioned as the personal secretary to Lura.<sup>10</sup>

In December of 1990, there was a reallocation of work duties within RGC and the additional position of Secretary III (Sec. III) was created. This Sec. III position was to report directly to Lura and was also designated as having "confidential" status, pursuant to the definition set out at Iowa Admin. Code 581-r 1.1. There were, then, two positions within RGC retaining "confidential" status: (1) the AA I and (2) the newly created Sec. III. Both of these positions became vacant and in March of 1991, RGC took action to fill those open positions.

RGC was granted the authority to fill the AA I position and in April, 1991, Ramirez accepted the position of AA I and Connie Eichorn accepted the Sec. III position (the newly created position). Both the Sec. III position, now held by Eichorn, and the AA I position, now held by Ramirez, continued to be classified as "confidential-exempt" positions for the purpose of collective bargaining under Chapter 20.<sup>11</sup>

---

<sup>9</sup>Iowa Code §99D.5(1).

<sup>10</sup>State's Ex. J.

<sup>11</sup>See supra text.

Prior to accepting the AA I position at RGC, Ramirez worked as a Sec. III in the Foster Care Review Board, but had "topped out" (i.e. reached the maximum compensation level) in that position. It was her belief that it was necessary for her to take an AA I position in order to advance from a secretarial position into a management position. With this plan in mind, on April 5, 1991, Ramirez took a voluntary demotion from her Sec. III position and accepted the AA I position with RGC, knowing that her salary would be reduced, and that she was accepting a voluntary demotion.

When she accepted the position of AA I at RGC, Lura, (the RGC Administrator), requested that IDOP "red-circle" Ramirez' pay.<sup>12</sup> Issues of "red-circle" are investigated and responded to by IDOP Personnel Officers. Once attention was drawn to the confidential status of Ramirez' AA I position, the "confidential-exempt" status was questioned by Chris Peden, an IDOP Personnel Officer who approves or denies certain classification/reclassification transactions.

In attempting to make an accurate determination on the confidential status of the Ramirez AA I position, Peden requested an evaluation of the position from Phyllis Watson, an IDOP Personnel Management Specialist V. It is her job to review positions when an issue arises as to the appropriateness of

---

<sup>12</sup>This would have allowed her to retain the former higher salary of the Sec. III while performing the duties of the AA I and remain at that higher salary rate until such time as increases within the AA I classification "caught up" to the higher pay rate.

"confidential" status.<sup>13</sup> She evaluates positions to determine if the employees function in a manner which would exclude them from coverage of Public Employment Relations Act (Act) (i.e. the §20.4(3) & §20.3(7) criteria) or whether the employees function in a manner which would exclude them from coverage under the merit system (i.e. the IDOP Rule 1.1 criteria).<sup>14</sup> In Watson's review and evaluation of a confidentiality issue, she considers: (1) what type of information the employee in question has access to; (2) how much information the employee has access to; (3) what is the purpose of the information; (4) who is the Department's Chief Spokesperson for bargaining purposes and; (5) what contact that spokesperson has with the information gathered by the employee. Watson found that Ramirez did not function as personal secretary to the administrator (Lura) and met no other exclusionary criteria.

After the investigation by Watson, Peden began the process of removing Ramirez' AA I position from a "confidential-exempt" status (i.e. exempt from coverage of the collective bargaining agreement) into a classification which was coded as a "contract-covered class".<sup>15</sup> Before finalizing the process, Peden gave RGC the opportunity to provide documentation to support its contention that the Ramirez position was actually confidential, but RGC was unable

---

<sup>13</sup>Since the reorganization of IDOP, in approximately 1986, IDOP has attempted to evaluate positions previously listed as confidential to see that they actually meet the designated criteria.

<sup>14</sup>See supra text.

<sup>15</sup>State's Ex. G1

to provide Peden with satisfactory information. Peden then issued a memorandum directing that IDOP change the "class code and bargaining unit" status of the Ramirez position.<sup>16</sup> The tangible result of the change in bargaining unit status was a reduction in Ramirez' pay by an additional pay grade. (i.e. she now received approximately \$60 less per pay period than she would have received had she remained in a "bargaining unit exempt" status).

On June 4, 1991, Ramirez filed a "non-contract grievance." In that grievance, Ramirez alleged that she received a "reduction in pay due to reclassification of [her] position assumed on April 12, 1991, which was made effective May 10, 1991, [and she] received notification of the reduction on May 24, 1991." She further alleged that "Grievant was denied 'red-circling' of pay which is against IDOP Administrative Rule 4.5(17)." As a remedy she requested that "classification" of her AA I position be made "confidential". The grievance was denied at first step and was immediately advanced to third step where it was denied by Peden on July 31, 1991, before it was appealed to PERB. In a letter to PERB, dated August 8, 1991, Ramirez accepted the Director's decision to deny the "red-circling" of her position but continued to assert that her position was confidential and that IDOP inappropriately removed the AA I's "confidential" status.

---

<sup>16</sup>Id.



The Performance Plan<sup>17</sup> of Ramirez' predecessor specifically states that a major responsibility of the AA I position is to "serve as personal secretary to the division director". The Performance Plan of Connie Eichorn, the new Sec. III, clearly indicates that a major responsibility of that position is to "serve as personal secretary to the Administrator and the Deputy Administrator" (Lorenzo Creighton). The Performance Plan for Ramirez states that she is to "serve as backup recording secretary for the Commission meetings" and "serve as backup to the Sec. III position" (emphasis added). In Ramirez' Performance Plan, another designated duty is to "assist in the preparation of special reports" which includes "doing research related to policy development and/or collective bargaining issues". Evidence indicated that Ramirez had never done such research, and had never gathered, formulated or referred any information on collective bargaining issues to either the DIA liaison, John Schaffner, or to IDOP. Even though Ramirez accepted the AA I position subsequent to the end of the collective bargaining which took place between the State of Iowa and the various unions which represent certain state employees, never during the entire process of collective bargaining for the contract (which was to become effective July 1, 1991), did IDOP request any information from either DIA or the RGC, nor was

---

<sup>17</sup>A Performance Plan is a standardized document used statewide for purposes of advising employees of managements' expectations concerning job performance and evaluating that performance. See State's Ex. H & J and Appellant's Ex. 1.

there any information used in collective bargaining which was prepared by either DIA or RGC.

Evidence presented by Ms. Watson clearly indicates that there are essentially four status designations of state employees. Those designations are: (1) Employees covered by Cha. 19A and covered by Cha. 20 (correction officer is an example); (2) employees not covered by Cha. 19A and not covered by Cha. 20 (example is a dept. director's secretary as a "confidential" employee under the definitions of both §19A.3(160 and §20.3(7)); (3) employees covered by Cha. 19A but not covered by Cha. 20 (example is division director's secretary); and (4) employees not covered by Cha. 19A but covered by Cha. 20 (example is an education consultant).<sup>18</sup> This dispute arose when Ms. Ramirez' status was moved from #3 designation (covered by Cha. 19A but not covered by Cha. 20) to #1 designation (covered by Cha. 19A but also covered by Cha. 20).<sup>19</sup> The result was an unexpected decrease in her bi-weekly pay.

All evidence presented by Ramirez dealt with her status as either a "confidential" or a "non-confidential" employee under the definition of "confidential employee" found in Cha. 20.<sup>20</sup> Ramirez has consistently argued that IDOP's action in changing her status from "confidential-exempt" to "non-confidential and non-exempt" status was inappropriate, even arbitrary and capricious. At the

---

<sup>18</sup>State's Ex. I.

<sup>19</sup>State's Ex. G(2), G(3) & G(4).

<sup>20</sup>See supra text

close of Ramirez' case, the State renewed its Motion to Dismiss, and I reserved ruling.

#### CONCLUSIONS OF LAW

##### I. RULING ON MOTION TO DISMISS

The State's motion is based upon four separate grounds: (1) That PERB is without subject matter jurisdiction,<sup>21</sup> (2) that Ramirez' appeal to PERB is untimely, (3) that Ramirez' grievance was untimely and (4) Failure to state a claim upon which relief may be granted.

PERB's jurisdiction over state employee grievance and disciplinary action appeals flows, in part from §19A.14(1) Iowa Code (1991). That section provides:

1. *Grievances.* An employee, except an employee covered by a collective bargaining agreement which provides otherwise, who has exhausted the available agency steps in the uniform grievance procedure provided by the department of personnel rules may, within seven calendar days following the date a decision was received or should have been received at the second step of the grievance procedure, file the grievance at the third step with the director. The director shall respond within thirty calendar days following receipt of the third step grievance.

If not satisfied, the employee may, within 30 calendar days following the director's response, file an appeal with the public employment relations board. The hearing shall be conducted in accordance with the rules of public employment relations board and the Iowa administrative procedure Act. Decisions rendered shall be based upon a standard of substantial compliance with this chapter and the rules of the department of

---

<sup>21</sup>As previously stated, the State has consistently argued that the "non-contract grievance procedure" is an "inappropriate forum" and "PERB may have jurisdiction in another forum." While the State has never specifically argued that PERB lacks subject matter jurisdiction, I believe that the characterizations of the State directly challenge subject matter jurisdiction.

personnel. Decisions by the public employment relations board constitute final agency action. (emphasis added).

Those appeals brought under §19A.14(1), which contest a grievance, must present to PERB an allegation of a violation of Chapter 19A or IDOP rule.<sup>22</sup>

A. Lack of Subject Matter Jurisdiction

Subject matter jurisdiction refers to the power of a tribunal to hear and determine the class of cases to which a particular case belongs, administrative agencies possess no common law or inherent powers, but only those powers specifically conferred or necessarily implied from the statute creating them.<sup>23</sup>

The Act, Chapter 20, Iowa Code, is the major source of PERB's authority. Section 20.1(4) provides that PERB's powers and duties include: "[a]djudicating . . . state merit system grievances. . . ." Additionally, §19A.14, quoted above, clearly and unambiguously empowers PERB to conduct hearings on appeal from IDOP Director's decisions in both grievance [§19A.14(1)] and disciplinary action [§19A.14(2)] cases.

---

<sup>22</sup>Iowa Admin. Code 621-r.11.3(1) The appeal shall contain the following:

10. A statement of the Iowa Code chapter 19A provision and department of personnel rule(s) which has allegedly been violated. . . .  
r.11.3(2) Completion of the State Employee Grievance . . . Form shall constitute compliance with all subrule 11.3(1) requirements.

<sup>23</sup>See e.g. Iowa Dept. of Social Services v. Blair, 294 N.W.2d 567, 570 (Iowa 1980); Quaker Oats Co. v. Cedar Rapids Human Rights Comm'n., 268 N.W.2d 862, 868 (Iowa 1978); Branderhorst v. Iowa State Hwy. Comm'n., 202 N.W.2d 38, 40-41 (Iowa 1972); Soudabeh Janssens and IDOT, 90-MA-04 (Ruling on Motion to Dismiss).

Section 19A.14(1), in conjunction with §20.1(4), thus confers subject matter jurisdiction upon PERB to adjudicate state employee grievance appeals based upon alleged violations of Chapter 19A or IDOP rules which are filed within thirty calendar days following the director's response--nothing more and nothing less.

The Ramirez appeal to PERB, filed on August 22, 1991, alleges a violation of §19A.3(20).<sup>24</sup> The Director's "Third Step Grievance Answer" notes that it was "mailed 7-31-91." I find that Ramirez has alleged a violation of Chapter 19A and her appeal to PERB was filed within thirty calendar days following the director's response, therefore, the State's Motion to Dismiss for lack of subject matter jurisdiction is denied.

B. Appeal to PERB is Untimely.

For the reasons stated in Division I of the Conclusions of Law, I find that the Appeal was filed within the required thirty days and, therefore, the State's Motion to Dismiss based on the untimeliness of the appeal to PERB is denied.

C. The Ramirez Grievance, Filed with IDOP, was Untimely.

At the evidentiary hearing on January 31, 1991, and again in its post-hearing brief, the State argued that Ramirez' grievance at the first step was untimely<sup>25</sup> and therefore should be dismissed by PERB. This assertion by the State was not raised in either the

---

<sup>24</sup>Amended at hearing to reflect a violation of §19A.3(16).

<sup>25</sup>The State asserts that "PERB Rules suggest that a grievance should be filed within 14 days of when the grievant knew or should have known of the personnel action, the grievance should be considered untimely", however no citation was given and I find no such suggestion in any PERB Rule.

first or third step responses, nor did the State move to amend its answer to include such an assertion and thereby give notice to Ramirez that such an issue was in dispute. I find that the State has waived its right to raise the issue of untimeliness of the pre-PERB proceedings at this late date and deny the State's Motion to Dismiss based upon such an argument.

D. Failure to State a Claim Upon Which Relief May Be Granted.

A Motion to Dismiss for failure to state a claim serves the function of demurrer, which has been abolished by the Iowa courts.<sup>26</sup> In ruling on such a motion, the allegations of the pleading under attack are taken as true, and any ambiguity or uncertainty in the pleading is resolved in favor of the party resisting the motion.<sup>27</sup> Thus, the motion admits the facts alleged in the pleading under attack, and asserts that there is no right to relief from those admitted facts. In the courts, a Motion to Dismiss for failure to state a claim must be filed before the answer. Motions filed subsequent to answering are untimely.<sup>28</sup>

In the instant case, the State filed its Answer and Motion to Dismiss on September 6, 1991. PERB's rules contain no provisions concerning the time for the filing of a Motion to Dismiss for

---

<sup>26</sup>Herbst v. Treinen, 249 Iowa 695, 88 N.W.2d 820 (1958).

<sup>27</sup>Hoefer v. Sioux City Community School District, 375 N.W.2d 222 (Iowa 1985).

<sup>28</sup>See e.g. Ia.R.Civ.P. 104(b); Powell v. Khodari-Intergreem Co., 303 N.W.2d 171 (Iowa 1981); Riedrigger v. Marrland Development Corp., 253 N.W.2d 915 (Iowa 1977); Soudabeh Janssens, 90-MA-04; David Ramirez, 90-MA-10.

failure to state a claim. However, I can perceive no reason for PERB to adopt a totally unrestrictive procedure concerning motions which would allow parties, represented by counsel, to file and litigate motions which would clearly be untimely in the district courts. It is inappropriate that the State, without seeking to withdraw its answer and the denials contained within it, should now be allowed to attack the sufficiency of a pleading which it had full opportunity to scrutinize before answering. Consequently, I conclude that Ia.R.Civ.P. 104(6) applies to this case and that division of the State's motion premised upon an alleged failure to state a claim is denied.<sup>29</sup>

## II. MERITS OF RAMIREZ' CLAIM

In grievance appeals before PERB, "[d]ecisions rendered shall be based upon a standard of substantial compliance with this chapter and the rules of the department of personnel."<sup>30</sup> Ramirez' amended appeal to PERB alleges that there has been a violation of §19A.3(16).<sup>31</sup> Ramirez has failed to present any evidence showing a violation of §19A.3(16). The Code section at issue is definitional in nature and I fail to perceive how it either directs action or prohibits action on the part of IDOP or RGC. It simply cannot be violated.

---

<sup>29</sup>I note that Ramirez has alleged a violation of Iowa Code §19A.3(16), a definitional subsection which neither requires nor prohibits action by IDOP. In the instant case, had a Motion to Dismiss for failure to state a claim upon which relief may be granted been filed properly, it would have been granted.


<sup>30</sup>Iowa Code §19A.14(1)(1991).

<sup>31</sup>See supra at FN 2 and FN 3.

Since it is incumbent upon Ramirez to show that IDOP or RGC failed to substantially comply with either a statutory obligation of Chapter 19A or some specified rule of IDOP, I find that Ramirez has failed in her burden.<sup>32</sup>

Based on the foregoing Facts and Conclusions of Law, I find no violation by IDOP or RGC and dismiss Ramirez' appeal in its entirety.

DATED at Des Moines, Iowa this 15<sup>th</sup> day of June, 1992.

  
Diane Tvrdik,  
Administrative Law Judge

---

<sup>32</sup>This is not to suggest that Ramirez is without some forum in which to present her protest. IDOP has suggested and I concur, that the required procedure is through the bargaining unit determination process established by Iowa Code §20.3(1)(1991). PERB has promulgated a rule to "clarify the inclusion or exclusion of job classifications or employees in a board determined bargaining unit." See Iowa Admin. Code 621-r.4.7(20). A petition may be filed by the public employer, an affected public employee, or the certified employee organization (emphasis added).